Full compensation no longer sacrosanct: Reflections on the past and future economic loss 'cap' for high income earners[1]

Abstract

The civil liability provisions relating to the assessment of damages for past and future economic loss have abrogated the common law principle of full compensation by imposing restrictions on the damages award, most commonly by a "three times average weekly earnings" cap. This consideration of the impact of those provisions is informed by a case study of the Supreme Court of Victoria Court of Appeal decision, *Tuohey v Freemasons Hospital* (*Tuohey*)[2], which addressed the construction and arithmetic operation of the Victorian cap for high income earners. While conclusions as to operation of the cap outside of Victoria can be drawn from *Tuohey*, a number of issues await judicial determination. These issues, which include the impact of the damages caps on the calculation of damages for economic loss in the circumstances of fluctuating income; vicissitudes; contributory negligence; claims *per quod servitum amisit;* and claims by dependants, are identified and potential resolutions discussed.

Introduction

The preamble to the terms of reference of the 2002 *Review of the Law of Negligence* stated that:

> [t]he award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another. It is desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death.[3]

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[2] [2012] VSCA 80. The issue came before the Court of Appeal as a stated case, to determine the point.

[3] 'Terms of Reference: Principles-Based Review of the Law of Negligence' in David Ipp et al, 'Review of the Law of Negligence Final Report', (2002) http://revofneg.treasury.gov.au/content/review2.asp, ix.

In accordance with this brief, the Ipp Review panel proposed various reform recommendations[4] which, despite a call for a national response,[5] were enacted to varying extents by non uniform civil liability legislation across Australia.[6] The impact of the liability provisions of the civil liability legislation on fundamental principles of the common law of negligence has been the subject of earlier discussion and critical analysis, particularly in relation to the effect of the personal responsibility provisions on the allocation of risk between stakeholders.[7]

This article considers the legislative provisions which have limited the quantum of damages and thereby abrogated the common law principle of full compensation (under which a plaintiff is compensated for loss caused by the defendant so far as this can be done by a monetary award) by imposing damages thresholds and caps. In particular, the focus is on the impact of the civil liability provisions, enacted in most Australian jurisdictions, which relate to the assessment of damages for past and future economic loss and modify the full compensation principle in various ways, most commonly by a "three times average weekly earnings" cap. The discussion will be informed by a case study of the Supreme Court of Victoria Court of Appeal decision, *Tuohey v Freemasons Hospital*,[8] which considered the arithmetic operation and practical application of the "three times average weekly earnings" cap for high income earners. While some conclusions as to the arithmetic operation of the cap outside of Victoria can be drawn from *Tuohey*, a number of issues remain unresolved. These issues, which relate to the impact of the damages caps on the calculation of damages for economic loss in the circumstances of fluctuations in income; vicissitudes; contributory negligence; claims *per quod servitum amisit;* and claims by dependants are identified and potential resolutions discussed.

[4] 'List of Recommendations' in David Ipp et al, 'Review of the Law of Negligence Final Report', (2002) http://revofneg.treasury.gov.au/content/review2.asp, 1-9.
[5] Recommendation 1 'List of Recommendations' in David Ipp et al, 'Review of the Law of Negligence Final Report', (2002) http://revofneg.treasury.gov.au/content/review2.asp, 1.
[6] See Des Butler, 'A comparison of the adoption of the Ipp Report Recommendations and Other Personal Injuries Liability Reforms' (2005) 13 Torts Law Journal 203.
[7] See for example: Harold Luntz, 'Reform of the Law of Negligence: Wrong Questions - Wrong Answers' [2002] UNSW LawJl 49; Barbara McDonald, 'The impact of the civil liability legislation on fundamental policies and principles of the common law of negligence' (2006) 14 TLJ 268; Joachim Dietrich, 'Duty of care under the 'Civil Liability Acts'', (2005) 13 TLJ 17; and Andrew Field, 'There must be a better way': Personal Injuries Compensation since the 'Crisis in Insurance' (2008) 13(1) Deakin Law Review 67.
[8] [2012] VSCA 80 (*Tuohey*). The issue came before the Court of Appeal as a stated case, to determine the point.

Economic loss damages cap: Legislative History

In *Todorovic v Waller*[9] Chief Justice Gibbs and Justice Wilson set out the fundamental principles which apply to the assessment of damage in personal injury claims at common law. Their Honours said:

> In the first place, a plaintiff who has been injured by the negligence of the defendant should be awarded such a sum of money as will, as nearly as possible, put him in the same position as if he had not sustained the injuries.[10]

At common law, the full compensation principle has been a guiding principle underlying the assessment of damages for loss of earning capacity, whereby damages are to be assessed by reference to the plaintiff's established loss. Under this approach damages for economic loss are assessed by reference to the actual pre-injury earnings of the plaintiff, rather than an objective yardstick of average earnings or what a defendant may have reasonably foreseen that a plaintiff was earning.[11] As Lord Justice Scrutton explained in *The Arpad*:

> You negligently run down a shabby looking man in the street and he may turn out to be a millionaire engaged in a very profitable business which the accident disables him from carrying on … You have to pay damages resulting from the circumstances of which you have no notice. You have to pay the actual loss to the man…[12]

Although the principle of full compensation may to some extent meet the corrective justice and deterrence policy justifications for the award of tort damages[13] this has been subject to criticism by various commentators, most notably Professor Luntz,[14] particularly given that high income earners are generally able to make their own arrangements through insurance to maintain their incomes and that it is just to require them to do so. The suggestion is that as high earners generally receive larger damages awards than lower income earners in respect of the same injuries, yet all consumers pay

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[9] (1981) 150 CLR 402.
[10] *Todorovic* (1981) 150 CLR 402, 412.
[11] For an overview see Harold Luntz, David Hambly, Kylie Burns, Joachim Dietrich and Neil Foster, *Torts: Cases and Commentary* (Lexis Nexis Butterworths, 6th ed, 2009) [8.2.20]. The leading Australian work is Harold Luntz, *Assessment of Damages for Personal Injury and Death* (Butterworths, 4th ed, 2002, revised 2006).
[12] [1934] P 189 (CA), 202-3. See also *Nader v Urban Transport Authority of New South Wales* (1985) 2 NSWLR 501, 536-8 (McHugh JA): "The defendant who is unfortunate enough to run down a millionaire must pay accordingly."
[13] For a consideration of underlying policy see Harold Luntz, David Hambly, Kylie Burns, Joachim Dietrich and Neil Foster, *Torts: Cases and Commentary* (Lexis Nexis Butterworths, 6th ed, 2009) chapter 1; and Prue Vines 'Introduction' in Carolyn Sappideen and Prue Vines (eds), Fleming's the Law of Torts (Lawbook Co, 10th ed, 2011).
[14] Harold Luntz, editorial comment 'Keeping Professors in the Comfort to which the have Grown Accustomed' (1995) 3 *TLJ* 1.

the same for the goods and services which subsume the cost of tort awards, this involves an inappropriate redistribution from poorer members of society in favour of the wealthy.[15]

On the other hand, it has been argued that using the tort system of compensation to impose "social levelling only upon randomly selected groups of accident victims in an otherwise unequal society, would be regarded by many as unjust."[16]

In their consideration of the options to limit quantum of damages, the authors of the Review of Negligence Report accepted the full compensation principle as the basic principle guiding their deliberations regarding the assessment of damages for personal injury and death. This principle, the authors said, applies most straightforwardly to damages for economic losses; and it requires that all such losses should be compensated for to their full extent.[17] However they stated that this guidance was subject to the following significant qualification:

> Although the full compensation principle is fundamental to personal injury law, it is often merely assumed to be the appropriate basis for the assessment of damages. The Panel does not believe that the full compensation principle is sacrosanct or that it should be beyond reconsideration and revision. The very many statutory provisions in various Australian jurisdictions that effectively qualify the full compensation principle reflect community attitudes that are supportive of such an approach.[18]

After noting that compensation for loss of earning capacity can represent a very significant proportion of the total compensation in serious injury cases, the Review Panel concluded that high income earners could be expected to take steps to protect

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[15] See also Stephen Sugarman, 'Tort Reform Through Damages Reform: An American Perspective' (2005) 27 Sydney Law Rev 507; Stephen Sugarman 'Damages' in Carolyn Sappideen and Prue Vines (eds), Fleming's The Law of Torts (Lawbook Co, 10th ed, 2011), [10.110].

[16] Carolyn Sappideen, Prue Vines, Helen Grant and Penelope Watson, 'Torts Commentary and Materials (Thomson Reuters, 10th ed, 2009), [14.55], 540. See also The Hon Paul de Jersey AC, Chief Justice Supreme Court of Queensland, 'Tort Law Reform in Queensland: Was it necessary, is it fair and who has benefited from it?', (Paper presented at Australian Lawyers Alliance, Queensland Conference Royal Pines Resort, 17 February 2006) http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/QldJSchol/2006/9.html?stem=0&synonyms=0&query=cla2003161%20s54, 5.

[17] David Ipp et al, 'Review of the Law of Negligence Final Report', (2002) http://revofneg.treasury.gov.au/content/review2.asp, [13.3].

[18] Ibid.

themselves against severe impairment of their earning capacity[19] which can be achieved by obtaining private income protection insurance. [20]

The Review Panel ultimately concluded that whilst it was "neither necessary nor desirable" to create a lower end threshold for loss of earnings capacity claims,[21] the imposition of an upper end cap was warranted, particularly because such a cap provides high earners with a desirable incentive to insure against loss of the capacity to earn more than the amount of the cap.[22] In order to determine the appropriate level for such a cap, the Panel members examined data regarding the number of employees who earned more than two or three times average annual full time adult ordinary time earnings in Australia.[23] Furthermore, the Panel noted that the annual value of the disability support pension payable to a person who is totally incapacitated for work was $10,966 and the annual value of unemployment benefits $9,620. They concluded that it was "difficult to accept that a very high earner who is totally incapacitated in circumstances that give rise to a successful negligence claim should receive fully earnings-related income replacement, while a totally incapacitated person who is not able to make a successful negligence claim may have to manage on modest means-tested income support benefits from the social security system".[24] Following these deliberations the Panel proposed, as recommendation 49, a cap of twice average annual full time adult ordinary time earnings which would affect only 2.4% of employees.[25]

Cap on damages for loss of earning capacity

Recommendation 49

The Proposed Act should provide for a cap on damages for loss of earning capacity of twice average full-time adult ordinary time earnings (FTOTE).

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[19] David Ipp et al, 'Review of the Law of Negligence Final Report', (2002) http://revofneg.treasury.gov.au/content/review2.asp, [13.7].
[20] Harold Luntz, editorial comment 'Keeping Professors in the Comfort to which the have Grown Accustomed' (1995) 3 *TLJ* 1; Discussed Stephen Sugarman, "Damages" in Fleming's the Law of Torts 10th ed 2011 (edited by Carolyn Sappideen and Prue Vines) at [10.110].
[21] David Ipp et al, 'Review of the Law of Negligence Final Report', (2002) http://revofneg.treasury.gov.au/content/review2.asp, [13.63].
[22] David Ipp et al, 'Review of the Law of Negligence Final Report', (2002) http://revofneg.treasury.gov.au/content/review2.asp, [13.64].
[23] David Ipp et al, 'Review of the Law of Negligence Final Report', (2002) http://revofneg.treasury.gov.au/content/review2.asp, [13.65].The Review Report includes helpful tables at [13.60] regarding the then current or proposed loss of earnings capacity thresholds and caps, in the various State civil liability and motor accident schemes.
[24] David Ipp et al, 'Review of the Law of Negligence Final Report', (2002) http://revofneg.treasury.gov.au/content/review2.asp, [13.67].
[25] Ibid.

Legislation in all Australian jurisdictions now imposes a cap on the quantum of damages for economic loss, which generally limits the award to three times the average weekly earnings.[26]

Economic loss cap in Victoria

In Victoria, section 28F was introduced into the *Wrongs Act* 1958 (Vic),[27] with purposes including to "limit the amounts that may be recovered as damages for death or personal injury caused by the fault of a person".[28] This section predated the Review Panel recommendation 49 and created a cap based on three times earnings rather than twice average weekly earnings.[29] In addition, by contrast to the panel's recommendation, s28F utilises earnings in Victoria, rather than Australia, as the benchmark; refers to all employees rather than all full time employees and is not limited to ordinary time earnings. Nevertheless, the core 'cap' component remains, which requires the court to disregard the amount by which the claimant's gross weekly earnings would (but for the death or injury) have exceeded three times the amount of average weekly earnings at the date of the award. Section 28F provides as follows:

> **Damages for past or future economic loss-maximum for loss of earnings etc.**
>
> 28F. Damages for past or future economic loss-maximum for loss of earnings etc.
>
> (1) This section applies to an award of damages-
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> (a) for past economic loss due to loss of earnings or the deprivation or impairment of earning capacity; or
>
> (b) for future economic loss due to the deprivation or impairment of earning capacity; or
>
> (c) for the loss of expectation of financial support.
>
> (2) In the case of any award to which this section applies, the court is to disregard the amount (if any) by which the claimant's gross weekly earnings would (but for the death or injury) have exceeded an amount that is 3 times the amount of average weekly earnings at the date of the award.

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[26] *Civil Law (Wrongs) Act 2002 (ACT)* s 98; *Civil Liability Act 2002 (NSW)* s12(2); *Civil Liability Act 2003 (Qld)* s54; *Civil Liability Act 1936 (SA)* s54; *Civil Liability Act 2002 (Tas)* s26; *Wrongs Act 1958 (Vic)* s28F(2); *Civil Liability Act 2002 (WA)* s11(1).

[27] By amending act, the *Wrongs and Other Acts (Public Liability Insurance Reform) Act 2012 (Vic).*

[28] *Tuohey*, [9].

[29] See, David Ipp et al, 'Review of the Law of Negligence Final Report', (2002) http://revofneg.treasury.gov.au/content/review2.asp,*Review of the Law of Negligence*, Table 3.

(3) For the purposes of this section, the amount of average weekly earnings at the date of the award is-

(a) the amount per week comprising the amount estimated by the Australian Statistician as the average weekly total earnings of all employees in Victoria for the most recent quarter occurring before the date of the award for which such an amount has been estimated by the Australian Statistician and that is, at that date, available to the court making the award; or

(b) if the Australian Statistician fails or ceases to estimate the amount referred to in paragraph (a), the prescribed amount or the amount determined in such manner or by reference to such matters, or both, as may be prescribed.

Some uncertainty as to the practical operation of this provision has now been resolved by the Supreme Court of Victoria Court of Appeal decision, *Tuohey v Freemasons Hospital*,[30] although several issues as to the operation of the damages caps provisions in Victoria, and elsewhere in Australia, remain unresolved.

Tuohey v Freemasons Hospital

The plaintiff, Mr Tuohey, an engineer, suffered injuries in 2005 in the course of treatment for an umbilical hernia at the defendant's hospital. Mr Tuohey suffered injury to his right eye shortly after the completion of the surgical procedure when a nurse, who had assisted him to stand, left him unattended and he fell to the floor.[31]

In the course of settlement negotiations, it became apparent that there was disagreement between the parties as to the operation of the statutory economic loss cap. Judge Saccardo in the County Court of Victoria referred to the Court of Appeal for determination the issue of the correct interpretation of the expression appearing in section 28F(2) of the *Wrongs Act 1958 (Vic)*:[32]

> ...the Court is to disregard the amount (if any) by which the claimant's gross weekly earnings would (but for the death or injury) have exceeded an amount that is three times the average weekly earnings...

The plaintiff contended that the quantum per week which may be claimed in respect of past or future economic loss is capped at three times average gross weekly earnings and that this limit applies to the difference between "without injury" and "with injury"

[30] [2012] VSCA 80. The issue came before the Court of Appeal as a stated case, to determine the point.
[31] *Tuohey*, [3].
[33] *Tuohey*, [10],[11].

earnings, to the extent (if any) that the difference is in excess of that limit. Such a construction gives primacy to the term "award" of damages and requires "the amount" of loss of the claimants' earnings to be disregarded to the extent it exceeds the prescribed limit. This construction treats the gross weekly earnings that the claimant "would have" received, but for the injury, as a hypothetical evaluation of lost earning capacity rather than the claimant's "without injury" earnings.[33]

The defendant contended that the quantum of the plaintiff's "without injury" earnings is capped at three times average gross weekly earnings before the plaintiff's "with injury" earnings are deducted. Under this approach where the "with injury" earnings exceed the capped "without injury" earnings, the plaintiff will not have an entitlement to damages. [34]

For the purposes of the Court of Appeal hearing, the parties agreed notional figures relevant to the economic loss claim, summarised as follows:[35]

Without injury earnings (gross weekly amount that the plaintiff would have been able to earn had the injury not occurred): ***Earnings but for injury***	$10,548
With injury earnings (gross weekly amount the plaintiff is able to earn after injury): ***Earnings following injury***	$6,442
Actual loss	$4106
Three times average weekly earnings	$2,836

It is apparent from the above table that even after a reduction in earnings of about $4000 per week, the plaintiff continued to earn well in excess of three times average weekly earnings.

Judge of Appeal Redlich wrote the reasons of the court, with which Mandie JA and Kyrou AJA agreed.[36] The plaintiff was unsuccessful in arguing that the cap imposed by the legislation had the effect of limiting the loss claimed to three times average weekly earnings.

After noting that "where the words of a statute are clear, so too is the task of a court in interpreting the statute,"[37] Redlich JA accepted the defendant's construction, holding that the plaintiff was not entitled to any portion of the loss that he could have recovered

[33] *Tuohey*, [10],[11].
[34] *Tuohey*, [10].
[35] *Tuohey*, [6], [7], [16].
[36] *Tuohey*, [37] and [38] respectively.
[37] *Tuohey*, [17].

at common law as he had (both a "without injury" and) a residual "with injury" earning capacity which exceeds three times average weekly earnings.[38] His Honour said:

> There is no reason why the Court should depart from the literal meaning of the words in sub-s 28F(2), being one which also accords with their usage at common law. The 'amount' to be disregarded in sub-s 28F(2) is that part (if any) of the first component in the common law process of assessing damages for economic loss – namely the 'before', 'without' or 'but for' injury earnings component which exceeds the capped amount. From that resultant figure, the 'after' or 'with injury' earnings of the claimant are deducted and a lump sum calculated in order to determine the loss of earning capacity…[39]

Redlich JA confirmed that it is the "duty of the Court to give the words the meaning that the legislature is taken to have intended them to have."[40] The Court therefore considered the legislative intention behind section 28F(2), by reference to Victorian Parliamentary materials[41], determining that the legislative objective was to "aid the insurance industry".[42] His Honour concluded that there was "no disconformity between the language of sub-s 28F(2) and its purpose, or that of the Act as a whole, which would support a departure from a literal interpretation".[43]

It follows from this decision of the Supreme Court of Victoria Court of Appeal that although Mr Tuohey had suffered an actual loss in the order of $4000 per week, he could not recover that loss as his residual earning capacity exceeded three times average weekly earnings.

Comparative economic loss damages cap provisions

There is a degree of consistency in the approach taken to the earnings cap in the civil liability legislation throughout Australia.[44] As a result, *Tuohey* may be of assistance in relation to the construction of similar provisions in other jurisdictions.

Relevant extracts from the provisions throughout Australia are set out below:

Australian Capital Territory: *Civil Law (Wrongs)*	(1) In assessing damages for loss of earnings in relation to a claim, the court must disregard earnings above the limit mentioned in subsection (2). (2) The limit is 3 times average weekly earnings a week.

[38] *Tuohey*, [16].
[39] *Tuohey*, [22].
[40] *Tuohey*, [23], citing *Project Blue Sky Inc v Australian Broadcasting Authority (*1998) 194 CLR 355.
[41] *Tuohey*, [23]-[26].
[42] *Tuohey*, [25].
[43] *Tuohey*, [26].
[44] This consistency exists despite certain of the provisions predating the recommendation in the Review of the Law of Negligence. See Table 3, David Ipp et al, 'Review of the Law of Negligence Final Report', (2002) http://revofneg.treasury.gov.au/content/review2.asp, [13.60].

Act 2002 S 98	
New South Wales *Civil Liability Act 2002* S 12(2)	In the case of any such award, the court is to disregard the amount (if any) by which the claimant's gross weekly earnings would (but for the injury or death) have exceeded an amount that is 3 times the amount of average weekly earnings at the date of the award.
Queensland: *Civil Liability Act 2003* S 54	(1) In making an award of damages for loss of earnings, including in a dependency claim, the maximum award a court may make is for an amount equal to the limit fixed by subsection (2). (2) The limit is an amount equal to the present value of 3 times average weekly earnings per week for each week of the period of loss of earnings.
South Australia: *Civil Liability Act 1936* S 54	(1) If the injured person was incapacitated for work, damages for loss of earning capacity are not to be awarded in respect of the first week of the incapacity. (2) Total damages for loss of earning capacity (excluding interest awarded on damages for any past loss) are not to exceed the prescribed maximum.
Tasmania; *Civil Liability Act 2002* S 26	(1) Where a person is entitled to damages in respect of loss of earning capacity, a court must not award those damages on the basis the person was, or may have been capable of, earning income at greater than 3 times the adult average weekly earnings as last published by the Australian Bureau of Statistics before damages are awarded.
Victoria: *Wrongs Act 1958* S 28F(2)	In the case of any award to which this section applies, the Court is to disregard the amount (if any) by which the claimant's gross weekly earnings would (but for the death or injury) have exceeded an amount that is 3 times the amount of average weekly earnings at the date of the award.
Western Australia; *Civil Liability Act 2002* S 11(1)	In assessing damages for loss of earnings, including in an action under the Fatal Accidents Act 1959, the court is to disregard earnings lost to the extent that they would have accrued at a rate of more than 3 times the average weekly earnings at the date of the award.

Like in Victoria, legislation in the Australian Capital Territory, New South Wales, Tasmania and Western Australia imposes an obligation on the court to disregard earnings above the cap. The decision in *Tuohey* will therefore provide guidance in these jurisdictions as to the practical application of the economic loss damages cap provisions.

However, the Queensland provision, section 54 *Civil Liability Act* 2002 (Qld), is likely to give rise to a different practical result, as the provision there refers to the making of a maximum award rather requiring the Court to disregard amounts in excess of specified maximum earnings. That this is the case is supported by the fact that, as originally passed, the comparative Queensland section, which was formerly contained in s51 *Personal Injuries Proceedings Act 2002 (Qld),* also required that "a court must disregard earnings" above the limit, which was interpreted by McMurdo J in *Doughty v. Cassidy*[45] as requiring the court to ignore entirely any earnings that might be above the limit and so apply any discounts for contingencies, residual earning capacity and the like to that limit.[46] With the passing of the *Civil Liability Act 2003 (Qld),* this section was replaced by S 54 *Civil Liability Act 2003 (Qld),* to provide that the maximum award a court may make is an amount equal to the present value of three times average weekly earnings per week for each week of the period of loss of earnings.

By contrast, the South Australian legislation does not create a cap based on average weekly earnings, however in legislation predating the Review of the Law of Negligence, provided for an overall cap of $2.2 million on the global award for loss of earning capacity.[47] To put this overall cap in perspective, it has been calculated that the cap on loss of earning due to motor accidents imposed by the NSW Government capped loss of earnings due to motor accidents of $2712 per week (indexed from 2002) equates to a capital sum of $2.17 million for loss of 30 years earnings using the New South Wales[48] discount rate of 5 per cent.[49]

While the decision of decision in *Tuohey* is likely to provide valuable guidance as to the mathematical application of the economic loss damages cap provisions in Victoria, the Australian Capital Territory, New South Wales, Tasmania and Western Australia, various issues relating to the practical application of the economic cap provisions remain unresolved and await judicial consideration. These issues relate to the impact of the damages caps on the calculation of damages for economic loss in the circumstances of

[45] [2005] 1 Qd.R. 462.
[46] For a discussion see Duncan McMeekin SC 'When to Fold and when to hold – *Civil Liability Act 2003'* (Paper presented at the Barry & Nilsson Annual Insurance Law Review, Brisbane, 10 August 2006).
[47] Section 54 *Civil Liability Act 1936 (SA*), inserted by *Wrongs (Liability and Damages for Personal Injury) Amendment Act* 2002 (SA).
[48] Section 14, *Civil Liability Act* 2002 (NSW) establishes a prescribed discount rate of 5%.
[49] Peter Abelson 'Is Injury Compensation Excessive?' (2003) http://www.businessandeconomics.mq.edu.au/our_departments/Economics/econ_research/2003/Abelson_6_2003.pdf, accessed 16 August 2012.

fluctuating income; vicissitudes; contributory negligence; claims *per quod servitum amisit;* and claims by dependants.

Impact on economic loss damages calculation: Fluctuating income

Certain professionals, such as authors of literary, dramatic, musical or artistic works, inventors, performing artists, and sportspeople, may receive income which fluctuates widely over time. For example, professional athletes may earn at a high rate but only for limited number of years, or earn at a high rate during part of the year ('in season'), but a much lower rate at other times. For this reason, such persons may qualify for special taxation treatment such that for the purposes of assessing income taxation their income is averaged over a period of four years.[50]

For this category of income earners, unless the reality of the fluctuating income stream is taken into account, a calculation of annual income based on average weekly earnings could result in injustice as this may not be truly reflective of the person's true income position due to the possibility that a claimant's income may sometimes exceed the three times average weekly earnings cap, but at other times fall short of it.

Although the impact of this issue on the calculation of damages for economic loss did not arise for consideration in *Tuohey,* it was considered by the Queensland Supreme Court in *Doughty v Cassidy,*[51] which involved a claim by a jockey injured at a horse race. At the time, the relevant provision was found in section 51, *Personal Injuries Proceedings Act 2002 (Qld).* Section 51 provided:

> Damages for loss of earnings or earning capacity
>
> (1) In assessing damages for loss of earnings, including in a dependency claim, the court must disregard earnings above the limit fixed by subsection (2).
>
> (2) The limit is 3 times average weekly earnings per week.
>
> (3) In this section –
>
> "dependency claim" means a claim in relation to a fatal injury brought on behalf of a deceased's dependants or estate.

[50] For an overview see Australian Taxation Office, 'Income Averaging for Special Professionals', http://www.ato.gov.au/individuals/content.aspx?menuid=0&doc=/content/00313590.htm&page=4&H4, accessed 16 August 2012.
[51] [2004] QSC 366 (*Doughty*).

"loss of earnings" means –

(a) past economic loss due to loss of earnings or the deprivation or impairment of earning capacity; and

(b) future economic loss due to loss of prospective earnings or the deprivation or impairment of prospective earning capacity.

In relation to loss of past earning capacity, it was conceded by the defendant that the trial judge might assess Mr Doughty's past loss on the basis of two three month terms as a jockey in Macau, where his income would have been greater than as a jockey in Australia.[52] However, McMurdo J concluded:

> In my view that submission understates the prospects which Mr Doughty lost. Allowing for the various possibilities ranging from failing to obtain the licence at all to a stay as lengthy as that of Mr Didham, I conclude that it is reasonable to assess his loss on the basis of a total period in Macau of two years from 1 September 2000.[53]

The trial judge formed the view that it could not have been the legislative intention to discriminate between plaintiffs, who had the same earning capacity and who suffer a loss of the same extent from its impairment, according to whether their earnings would have been by equal weekly payments or less regular receipts or accruals.[54] Explaining his approach, McMurdo J said:

> To assess the earning capacity of, for example, a salesman earning large commissions but at irregular intervals, requires a consideration of what would have been earned over a period which is long enough to provide a reliable indication of that capacity. In such a case, whilst the plaintiff's earnings might have varied greatly from week to week, the earning capacity would not. Often then, the assumed earnings used in assessing damages can be quantified only by reference to an extensive period. Section 51 is then applied by comparing those earnings, or their equivalent as a weekly sum over that period, with the prescribed limit. In some cases earning capacity is able to be valued from the loss of a certain assumed weekly amount through to the plaintiff's likely retirement. In others, of which the present case is an example, the plaintiff's likely earnings would have been higher in a certain period than in other periods of his working life. The fair assessment of Mr Doughty's damages therefore requires calculations which adopt different amounts of earnings for those different periods, being respectively his likely time in Macau and his subsequent working life. If, apart from s 51, damages would be assessed by reference to a certain period for which earnings would have exceeded an amount, the weekly equivalent of which exceeds three times average weekly earnings, then s 51 requires the court to instead work from the premise that the earnings for that period would have been no more than the prescribed limit.[55]

[52] Doughty, [28].
[53] Ibid.
[54] *Doughty*, [48].
[55] *Doughty* [50].

The approach of the trial judge therefore contemplates a consideration of what would have been earned over a period which is long enough to provide a reliable indication of that capacity. This is consistent with the method of averaging adopted by the Commissioner of Taxation for special professionals. [56]

Accordingly, while consideration of the earnings in each and every week would appear neither appropriate nor necessary in most cases, there may be some cases where short periods of high income time might arguably require separate calculation so as to apply the three times average weekly earnings cap.

Impact on economic loss damages calculation: Vicissitudes

When assessing damages for loss of earning capacity, the court customarily makes an allowance for contingencies – the vicissitudes of life – which may impact on a person's capacity to earn a living. The main life events which may lead to loss of income are sickness, accident, unemployment, industrial disputes and death.[57] On the other hand, some events may lead to increased income, such as a promotion or shifting to more lucrative employment.[58] The allowance made on account of contingencies is determined as a question of fact in the circumstances of the particular case, although a common starting point is generally 15%.[59] Therefore, given that the plaintiff's individual circumstances are determinative of the quantum of the allowance, where a plaintiff is "trained for and experienced in work of a character which is largely immune from industrial disturbances and which is not as exposed to the effects of economic depression as are many other occupations",[60] it may be appropriate to apply a lesser percentage allowance reduction for contingencies. In relation to the calculation of the appropriate allowance, for contingencies or vicissitudes, in *Wynn v New South Wales Ministerial Corporation*[61] the High Court[62] said:

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[56] Australian Taxation Office, 'Income Averaging for Special Professionals' http://www.ato.gov.au/individuals/content.aspx?menuid=0&doc=/content/00313590.htm&page=4&H4, accessed 16 August 2012.
[57] *Wynn v New South Wales Insurance Ministerial Corporation* (1995) 184 CLR 485, 497 (Dawson, Toohey, Gaudron and Gummow JJ).
[58] *Bresatz v Przibilla* (1962) 108 CLR 541, 544 (Windeyer J).
[59] For an overview and critical analysis see Harold Luntz, David Hambly, Kylie Burns, Joachim Dietrich and Neil Foster, *Torts: Cases and Commentary* (Lexis Nexis Butterworths, 6th ed, 2009), [8.2.40].
[60] *Sharman v Evans* (1977) 138 CLR 563, [42] (Gibbs and Stephen JJ).
[61] (1995) 184 CLR 485.
[62] Dawson, Toohey, Gaudron & Gummow JJ (Brennan CJ relevantly agreeing).

> It is necessary to say something as to contingencies or "vicissitudes". Calculation of future economic loss must take account of the various possibilities which might otherwise have affected earning capacity. The principle and the relevant considerations were identified by Barwick CJ in Arthur Robinson (Grafton) Pty Ltd v Carter (1968) 122 CLR 649 at 659 as follows:
>
> > "Ill health, unemployment, road or rail accidents, wars, changes in industrial emphasis, so that industries move their location, or are superseded by new and different techniques, the onset and effect of automation and the mere daily vicissitudes of life are not adequately reflected by merely - and blindly - taking some percentage reduction of a sum which ignores them."
>
> It is to be remembered that a discount for contingencies or " vicissitudes " is to take account of matters which might otherwise adversely affect earning capacity and as Professor Luntz notes, death apart, "sickness, accident, unemployment and industrial disputes are the four major contingencies which expose employees to the risk of loss of income". Positive considerations which might have resulted in advancement and increased earnings are also to be taken into account for, as Windeyer J pointed out in *Bresatz v Przibilla*, "(a)ll 'contingencies' are not adverse: all 'vicissitudes' are not harmful". Finally, contingencies are to be considered in terms of their likely impact on the earning capacity of the person who has been injured, not by reference to the workforce generally. Even so, the practice in New South Wales is to proceed on the basis that a 15% discount is generally appropriate, subject to adjustment up or down to take account of the plaintiff's particular circumstances.[63]

In the context of assessing damages for economic loss under the civil liability caps, the question arises as to whether the customary vicissitudes adjustment is to be applied to the actual loss of earnings, or to the loss allowed upon application of the high income earners cap. This issue was mentioned in passing in *Tuohey*[64], although the Court did not determine the issue, no doubt because this would have been of no practical concern given that no loss was recoverable because Mr Tuohey's post injury earnings still exceeded three times average weekly earnings. However, if a total loss of earning capacity was to be assumed the question would have arisen as to whether the limit on recovery to three times average weekly earnings (in that matter, $2,836) should be further reduced by a percentage for vicissitudes.

This issue was determined in *Doughty*, with the trial judge discounting the capped loss by 15% for vicissitudes.[65] Justice McMurdo was of the view that such an approach was consistent with the approach taken by the Court of Appeal of the Supreme Court of New

[63] (1995) 184 CLR 485, 497.
[64] *Tuohey*, [14].
[65] *Doughty*, [56].

South Wales in *Kaplantzi v Pascoe,*[66] a case in which the Court considered a similar provision found in legislation relevant to transport accident claims.[67]

Whilst the making of an appropriate deduction on account of vicissitudes is clearly within the principled application of the law relating to the assessment of damages, it is open to argument that compounding the impact of the damages cap on high income earners is to engage in further arbitrary and unjust social levelling[68] and a further erosion of the principle of full compensation which goes beyond that sanctioned by parliament.

By contrast, as the Queensland and South Australian provisions limit the quantum of damages which may be awarded for economic loss to a maximum amount, in those jurisdictions it would seem to accord with the intention of the legislature that a deduction should be made on account of vicissitudes before the damages cap is applied to limit the award to the maximum amount, rather than the deduction for vicissitudes being made from the maximum award.

Impact on economic loss damages calculation: Contributory negligence

When a plaintiff "exposes himself or herself to a risk of injury which might reasonably have been foreseen and avoided and suffers an injury within the class of risk to which the plaintiff was exposed",[69] that is, fails to take reasonable care for his or her own safety, he or she will be found to be guilty of contributory negligence. In cases of contributory negligence, apportionment legislation throughout Australia provides that damages recoverable by the plaintiff are reduced to the extent that the court considers just and equitable.[70]

Where economic loss damages are to be reduced for contributory negligence, the issue as to at what point the reduction is made arises again. Although this issue was not directly considered in *Doughty*, it may be that the approach of the trial judge, who

[66] [2003] NSWSC 386.
[67] Section 125 *Motor Accidents Compensation Act* 1999 (NSW).
[68] Carolyn Sappideen, Prue Vines, Helen Grant and Penelope Watson, 'Torts Commentary and Materials (Thomson Reuters, 10th ed, 2009), [14.55], 540.
[69] *Joslyn v Berryman* (2003) 214 CLR 552, [16] (McHugh J).
[70] *Law Reform Act 1995 (Qld)* s10(1); *Civil Law (Wrongs) Act 2002 (ACT) s102; Law Reform (Miscellaneous Provisions) Act 1965 (NSW) s9(1); Law Reform (Miscellaneous Provisions) Act 1956 (NT)* s16(1); *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA)* s7; *Wrongs Act 1954 (Tas)* s4(1); *Wrongs Act 1958 (Vic)* s26(1); *Law Reform (Contributory Negligence and Tortfeasors Contribution) Act 1947 (WA)* s4(1).

discounted the cap amount by 15% for vicissitudes[71] will be applied by analogy in relation to the contributory negligence deduction. For the reasons outlined above,[72] such an approach may be seen as a further erosion of the principle of full compensation.

In Queensland and South Australia, given that the provisions limit the quantum of damages which may be awarded for economic loss to a maximum amount, in those jurisdictions it is arguable that a deduction should be made on account of contributory negligence before the damages cap is applied to limit the award to the maximum amount,[73] rather than the deduction for contributory negligence being made from the maximum award.

Impact on economic loss damages calculation: Claims *per quod servitium amisit*

According to the principle of *per quod servitium amisit,* an employer may make a claim for damages arising out of the loss of services of an employee. The claim is derivative in that it relates to the loss to an employer, the plaintiff in the cause of action, of the services of an employee occasioned by the injury suffered by the employee as a result of the tortuous conduct of the defendant to the employee.[74] Accordingly the damages award amounts to compensation for the loss suffered by the employer, not the injured employee.

Commentators have argued for the abolition of this action on various grounds, including that the employer's costs arising from the employee's injuries are most easily met either by first party insurance or passing on the costs to consumers which would spread the cost widely through the community, saving litigation and administrative costs.[75] However, in a number Australian jurisdictions the action continues to be available, at least for some personal injury claims. Indeed, in New South Wales, although the claim *per quod servitium amisit* has been abolished in cases where the employee was injured in a road

[71] *Doughty*,[56].
[72] See the discussion of the impact of vicissitudes.
[73] Cf s58 *Civil Liability Act 2003 (Qld)* where the section expressly provides for a construction which is favourable to the plaintiff in relation to the impact of the contributory negligence deduction in the determination as to whether the plaintiff meets a damages threshold in order for employers to qualify for a claim *per quod servitium amisit.*
[74] *Mathew Chaina v The Presbyterian Church (NSW) Property Trust and 15ors* [2007] NSWSC 353 (*Chaina),* [3] (Howie J); *Commonwealth v Quince* [1944] 68 CLR 227.
[75] Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, "The Law of Torts in Australia", (Oxford University Press, 5th ed 2012),[16.4.1], 727.

accident[76] or at work by a fellow employee,[77] in other circumstances it has been held to have survived the civil liability legislation.[78]

In New South Wales there is authority for the proposition that the economic loss damages cap will not apply to a claim *per quod servitium amisit*. In *Mathew Chaina v The Presbyterian Church (NSW) Property Trust and 15 Ors*,[79] a claim arising out of the death of a student on school camp, Howie J was unable to conclude that it was the intention of parliament that s 12 *Civil Liability Act* 2002 (NSW) applied to a *per quod servitium amisit* claim notwithstanding the anomalous situation that would follow such a finding.[80] Howie J said:

> This situation seems on its face to be anomalous and unfair. Why should a company be able to recover full compensation for economic loss resulting indirectly from personal injuries suffered by an employee, yet the employee who has actually suffered the injuries be unable to recover full compensation for the loss arising directly from the injuries? However, if this is the result that follows upon a proper construction of the relevant provisions, then so be it. Anomalies in this area of the law are not unusual.[81]

His Honour held that a reasonable and rational interpretation of the wording, referring to net weekly loss of earnings, was an inapt way of dealing with a company's loss of revenue by way of profit or otherwise, which would not generally be considered as weekly earnings.[82]

Although he considered that the definition of "personal injury damages" could include compensation for loss of services, so that Part 2 of the *Civil Liability Act 2002 (NSW)* could apply, Howie J concluded that it was:

> "impossible however to construe s12(2) so that it must apply to the company plaintiff's claims… It seems irrational, illogical and unfair. … the words and concepts used in s12(2) have a clear meaning that is incompatible with a loss of services by a company. I would have been prepared to find that the wording of s12(1) might have included a claim for loss of services if the other subsections

[76] Section 142 *Motor Accidents Compensation Act 1999 (NSW).*
[77] Section 4 *Employees Liability Act 1991 (NSW).*
[78] *Mathew Chaina v The Presbyterian Church (NSW) Property Trust and 15ors* [2007] NSWSC 353, [6], [49] (Howie J).
[79] [2007] NSWSC 353.
[80] *Chaina*, [9].
[81] *Chaina*,[9]; citing *Landon v Ferguson*(2005) 64 NSWLR 131, 135 (Ipp JA).
[82] *Chaina*, [45].

could reasonably apply even though those words on their face seem to be referring to a claim by an injured person."[83]

Accordingly, the economic loss damages cap provision does not apply in New South Wales to limit the damages recoverable by a plaintiff in a *per quod servitium amisit* claim. It is likely, absent any specific statutory provision, that a similar outcome would arise in other jurisdictions, particularly Victoria, the Australian Capital Territory, Tasmania and Western Australia where the legislation is essentially the same as in New South Wales.

In Queensland, this issue has been specifically addressed by s 58 *Civil Liability Act 2003 (Qld)* which provides:

> 58 Damages for loss of consortium or loss of servitium
> (1) A court must not award damages for loss of consortium or loss of servitium unless--
> (a) the injured person died as a result of injuries suffered; or
> (b) general damages for the injured person are assessed (before allowing for contributory negligence) at $30000 or more.
> (2) The court must not assess damages for loss of servitium above the limit fixed by subsection (3).
> (3) The limit is 3 times average weekly earnings per week.

Therefore in Queensland, it is made clear in the legislation that the *per quod servitium amisit* claim can only be made out in cases in which the employee's own general damages are assessed at $30,000 or more and such damages awards are subject to a cap of three times average weekly earnings. The election of parliaments in the other Australian jurisdictions not to follow the example of Queensland and impose specific caps and thresholds on *per quod servitium amisit* claims provides further validation of the outcome in *Chaina.*

Impact on economic loss damages calculation: Claims by dependants

Claims by dependants following the death of a breadwinner caused by the "wrongful act, neglect or default" of the defendant can be brought pursuant to legislation enacted in all Australian jurisdictions which is based on the English *Fatal Accidents Act (1846) (Lord Campbell's Act).*[84] This legislation abrogates the common law rule that the "death of a

[83] *Chaina*, [50].
[84] *Civil Law Wrongs Act 2002 (ACT) s24; Compensation to Relatives Act 1897 (NSW) s3(1); Compensation (Fatal Injuries) Act (NT) s7; Supreme Court Act 1995 (Qld)s17; Wrongs Act 1958 (Vic) s16; Wrongs Act 1936*

human being could not be complained of as an injury"[85] which meant that no damages could be awarded.

The impact of the New South Wales three times average weekly earnings cap on claims by dependants was the subject of judicial consideration in *Taylor v The Owners – Strata Plan No 11564*[86] in the context of a claim for damages under the *Compensation to Relatives Act* 1897 (NSW). Section 12, Civil Liability Act 2002 (NSW) provides:

> 12 Damages for past or future economic loss-maximum for loss of earnings etc
>
> (1) This section applies to an award of damages:
>
> (a) for past economic loss due to loss of earnings or the deprivation or impairment of earning capacity, or
>
> (b) for future economic loss due to the deprivation or impairment of earning capacity, or
>
> (c) for the loss of expectation of financial support.
>
> (2) In the case of any such award, the court is to disregard the amount (if any) by which the claimant's gross weekly earnings would (but for the injury or death) have exceeded an amount that is 3 times the amount of average weekly earnings at the date of the award.
>
> (3) For the purposes of this section, the amount of average weekly earnings at the date of an award is:
>
> (a) the amount per week comprising the amount estimated by the Australian Statistician as the average weekly total earnings of all employees in New South Wales for the most recent quarter occurring before the date of the award for which such an amount has been estimated by the Australian Statistician and that is, at that date, available to the court making the award, or
>
> (b) if the Australian Statistician fails or ceases to estimate the amount referred to in paragraph (a), the prescribed amount or the amount determined in such manner or by reference to such matters, or both, as may be prescribed.

In *Taylor* a separate question for determination came before the Court which required consideration of whether the claim made pursuant to the *Compensation to Relatives Act* was one which is calculated by reference to the entirety of the financial support which the claimant and other dependants were entitled to expect from the deceased, or

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(SA); Civil Liability Act1936 (SA) s23; Fatal Accidents Act 1959 (WA) s4; Fatal Accidents Act 1959 (Tas) s4;Civil Liability Act1936 (SA) s23.

[85] *Baker v Bolton* (1808) 1 Camp 493.

[86] [2012] NSWSC 842 *(Taylor).*

whether the provisions of s 12(2) *Civil Liability Act* 2002 (NSW) limit recovery for the loss of that expected financial support, to a maximum sum calculated by reference to three times the average weekly earnings.[87]

The court held that a claim for damages under the *Compensation to Relatives Act* is one which is for damages that relate to the death of a person, and therefore subject to the high income earner cap provisions of the civil liability legislation, for the following reasons:

> (a) the word "damages" is defined in s 3 of the Civil Liability Act to include any form of monetary compensation. This would include a claim for pure economic loss such as a loss of expected financial support;
>
> (b) a claim under the Compensation to Relatives Act is not specifically excluded by the terms of s 3B of the Civil Liability Act, which is the only provision of the Act by which the application of the Act to all civil claims is specifically limited;
>
> (c) the definition of "harm" in s 5 of the Act makes it plain that Part 1A applies to claims for pure economic loss. It would be surprising if Part 1A applied to affect the determination of liability in accordance with the Act, but restrictions placed on the quantification of damages by the Act were inapplicable;
>
> (d) s 5T of the Act specifically includes a reference to Compensation to Relatives Act claims. This clearly suggests that it was intended that the Civil Liability Act apply to such claims. Similar comments made with respect to the previous subparagraph would also apply here with respect to the inconsistency between applying the liability provisions to Compensation to Relatives Act claims but not the damages provisions;
>
> (e) as Professor Fleming said in The Law of Torts 7th Ed (1987) at 630, a condition precedent to the bringing of an action under the Compensation to Relatives Act is that a person has died and the deceased would have been entitled to bring a claim but for the death. Since a condition precedent is closely connected with the death of a person who would otherwise have been a claimant, it seems improbable that the Act was not intended to apply to actions under the Compensation to Relatives Act;
>
> (f) the phrase "... that relates to ..." is one of broad meaning and effect. It ought not be given an unduly narrow meaning. A Compensation to Relatives Act action relates to the death of a person because it does not arise, and cannot be brought unless a person has died. As well, the liability aspects of such a claim depend on the tortious conduct (an act or omission) causing the death of an individual, which then deprives the claimant of expected financial support;
>
> (g) the inclusion of the phrase "... the loss of expectation of financial support ..." in s 12(1)(c) of the Act, refers directly to a Compensation to Relatives Act action, and the nature of recovery of damages in such an action. It explicitly suggests that

[87] *Taylor*, [14].

> Part 2 has application to such a cause of action. It is a phrase which is inapplicable to a traditional personal injury action.[88]

The wording of section 12(2) requires a court to disregard the amount (if any) by which *the claimant's* gross weekly earnings would (but for the injury or death) have exceeded an amount that is three times the amount of average weekly earnings at the date of the award. However, in a compensation to relatives claim, the deceased is not the claimant; the claimant is the deceased's personal representative. Despite this, Garling J found that the word 'claimant' should be interpreted, reflecting the intentions of the legislature,[89] so as to include "a deceased upon the basis of whose earnings a claim for loss of expectation of support is made in a *Compensation to Relatives Act* action."[90] Such a construction also avoided "an anomalous and unintended result' that death could provide a windfall, on the basis that the damages in a dependant's claim would not be subject to the cap.[91]

In *Taylor* Garling J observed that "(m)y conclusion, just expressed, is consistent with the reasoning of Howie J in *Chaina v The Presbyterian Church (NSW) Property Trust…*"[92] On the face of it this statement might be open to challenge given the apparent opposite outcomes of the two cases: the Court in *Chaina* found that the *per quod servitium* claim was not subject to the damages cap, yet in *Taylor,* the damages cap was held to apply to the compensation to relatives claim. Both claims, the *per quod servitium* claim and the *Compensation to Relatives Act* claim were held to be claims for damages for personal injury, and therefore *prima facie* subject to the civil liability legislation. However, it would seem that a key point of distinction is that in *Taylor* Garling J found that the language of s12(2) explicitly suggests that it has application to *Compensation to Relatives Act* actions given that it expressly provides for the "loss of expectation of financial support", which directly refers to the nature of recovery of damages in a dependants' claim and is inapplicable to a traditional personal injury action.[93] By contrast, in *Chaina,* Howie J held that "the words and concepts used in s12(2) have a clear meaning that is incompatible

[88] *Taylor,* [51].
[89] *Taylor*, [59]: "Accordingly, given that the intention of the legislation is to limit claims for tortiously caused damage, and to restrict financial loss claims for high earning individuals, it is consonant with that intention to read s 12(2) of the *Civil Liability Act* as applying to the deceased's income, in a *Compensation to Relatives Act* claim."
[90] *Taylor,* [56]. See also [74], [81]. His Honour set out his reasons for arriving at this conclusion out in detail at [56]-[65].
[91] *Taylor,* [62]-[63].
[92] *Taylor*, [53].
[93] *Taylor,* [51].

with a loss of services by a company. I would have been prepared to find that the wording of s12(1) might have included a claim for loss of services if the other subsections could reasonably apply even though those words on their face seem to be referring to a claim by an injured person."[94]

In Queensland, the position in relation to the application of the damages cap has been made clear by legislation. Section 54 *Civil Liability Act 2003 (Qld)* is expressly stated to apply to dependency claims: "54(1) In making an award of damages for loss of earnings, including in a dependency claim, the maximum award a court may make is for an amount equal to the limit fixed by subsection (2)."

Conclusion

Legislation in all Australian jurisdictions has eroded the full compensation principle by imposing limits, in most cases by way of a three times average weekly wages cap, on the quantum of damages which can be awarded for loss of earning capacity. The primary objective of such legislation is to limit compensation for injuries for the purpose of reducing costs. Unfortunately the legislation is not consistent, despite the first recommendation of the Review Panel, and has not necessarily achieved a principled approach to reform of the law of negligence.

While there is a degree of consistency between the legislation in Victoria, the Australian Capital Territory, New South Wales, Tasmania and Western Australia, Australian plaintiffs are now faced with a collection of laws relating to the recovery of damages for economic loss which may lead to uncertain, inconsistent, harsh and unjust outcomes in application. An example is found in the authority indicating that even where a damages cap applies to a high income earner to limit the quantum of damages for economic loss, the allowance for vicissitudes is deducted from the maximum award and not before the cap is applied,[95] despite the plaintiff facing a significantly lower damages award than full compensation.

[94] *Chaina*, [50].
[95] *Doughty.*

By contrast, the legislation in Queensland imposing caps on damages for economic loss is clearer in relation to the arithmetic calculation and is clearer in its impact on various claims such as *per quod servitium amisit* and claims by dependants.

The Queensland legislation may provide a useful starting point for drafting uniform national legislation. If that task is to be undertaken, the perhaps unintended cumulative effects of the high income earner caps for some injured persons could usefully be revisited.

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